

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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P/S

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75-2042

United States Court of Appeals

FOR THE SECOND CIRCUIT

STANLEY ROTHSCHILD,

Plaintiff-Appellant,

STATE OF NEW YORK, COMMISSIONER OF COR-
RECTIONAL SERVICES, HONORABLE GEORGE
ROBERTS, Acting Justice of the Supreme Court of
the State of New York, New York County,

Defendants-Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

BRIEF FOR PLAINTIFF-APPELLANT

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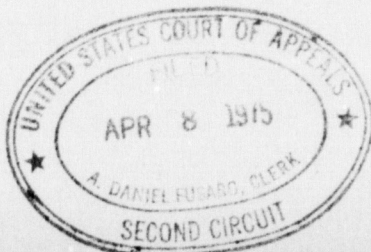




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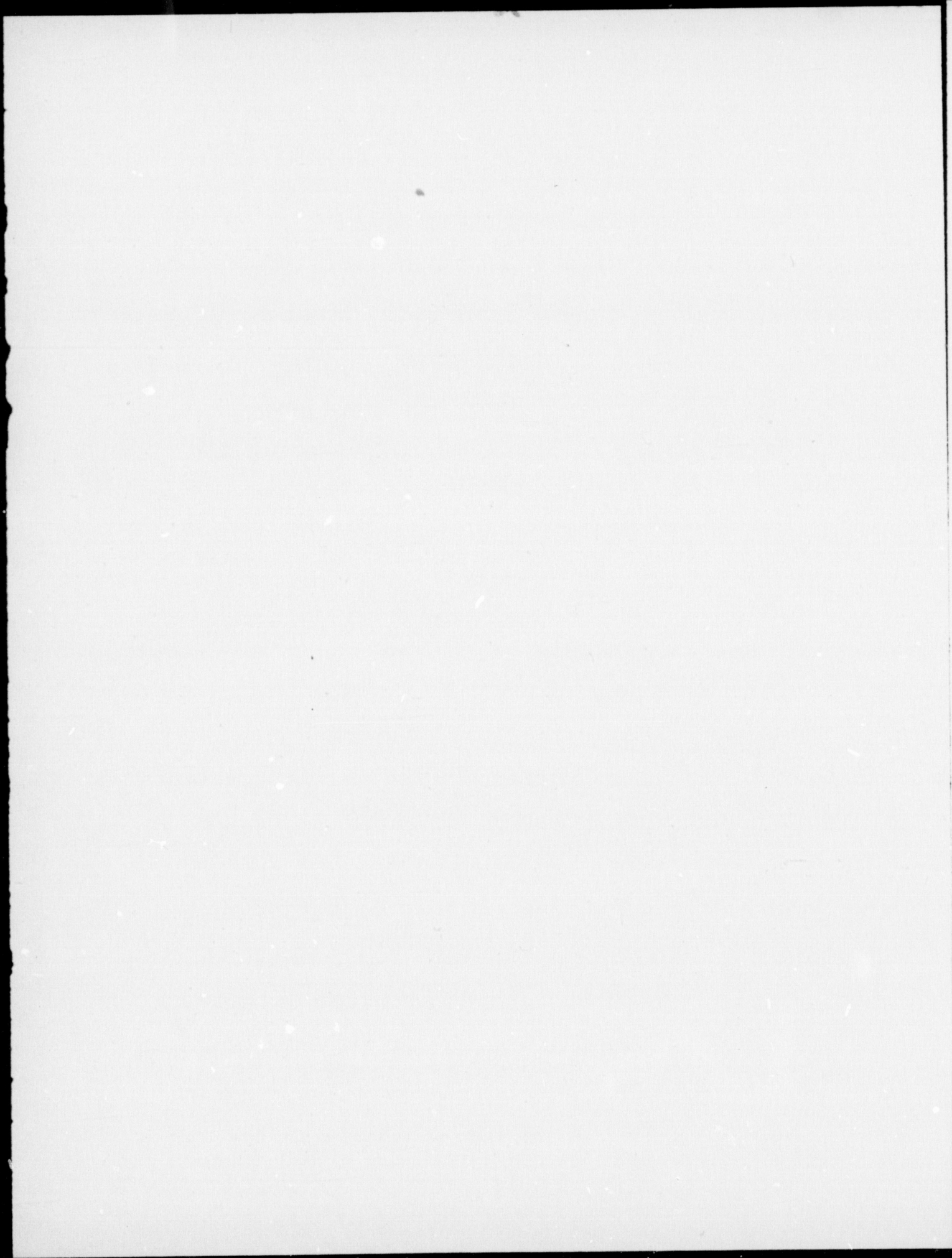
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To be argued by
Victor J. Herwitz

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2042

STANLEY ROTHSCHILD,

Plaintiff-Appellant,

-v.-

STATE OF NEW YORK, COMMISSIONER OF CORRECTIONAL SERVICES,
HONORABLE GEORGE ROBERTS, Acting Justice of the Supreme
Court of the State of New York, New York County,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT ROTHSCHILD

Preliminary Statement

Stanley Rothschild appeals from an order entered
February 10, 1975 in the United States District Court for
the Southern District of New York (Werker, D.J.) denying his
petition for a writ of habeas corpus to review a judgment
entered May 31, 1972 in the Supreme Court of the State of

New York, New York County (Baer, J.), rendered on a jury verdict convicting him of grand larceny in the first degree ^{1**} and attempted grand larceny in the first degree ² both by extortion, and sentencing him thereon to a maximum term of four years imprisonment on each count to run concurrently (4a-16a)*. That judgment was unanimously affirmed, without opinion, in the Appellate Division of that Court on May 24, 1973 (41 AD2d 1028). It was also unanimously affirmed in the New York Court of Appeals on November 27, 1974, with an opinion by Gabrielli, J. (35 NY 2d 355) (18a-22a). Rothschild, who had been free on bail pending appeal, surrendered on January 20, 1975 and is now incarcerated in the Greenhaven Correctional Facility (25a).

On March 10, 1975, District Judge Werker granted Rothschild's application for a certificate of probable cause to appeal (17a).

(*Numerals in parentheses followed by the letter "a" refer to the page numbers in the appendix filed with this Court.)

(**Superimposed numerals refer to numbered notes in the "addendum" to this brief.)

The Questions Presented

The following questions are presented:

1. Was the accused, a New York City policeman, denied his right to a fair trial in accordance with due process of law under the Fourteenth Amendment and his right under the Fifth Amendment to remain silent after his arrest without an incriminating inference being drawn therefrom where his defense to the attempted g- and larceny charge was that his intention had been merely to arrest the complainant for bribery but (a) the trial judge refused to allow him to so testify on his direct examination and he was precluded from doing so in any but the most indirect manner while under cross-examination; and (b) after eliciting that testimony on cross-examination, the prosecutor was permitted, over objection, to bring out that the accused had not explained his "good intentions" to his superior officers in the police department upon or after his arrest although, as the prosecutor knew but the jury did not, the accused had been suspended from duty continuously from the time of his arrest? (The New York Court of Appeals held that the objections to the prosecutor's questions as to the post-arrest silence of Rothschild were "properly over-ruled" (20a . Judge Werker

held that, in allowing those questions, the trial judge violated the Fifth Amendment rights of the accused (12a); and he further held that it was error to preclude him from testifying on his direct examination as to his "good intentions" (8a).)

2. Were the federal constitutional errors found by Judge Werker "harmless beyond a reasonable doubt" under the principles enunciated by the Supreme Court in Chapman v. California, 386 U.S. 18, 24 (1967)? (Judge Werker found (as did the New York Court of Appeals) that the evidence of Rothschild's guilt was "overwhelming" and that "any errors committed by the trial court were 'harmless beyond a reasonable doubt' " (citing Chapman v. California supra; cf. United States v. McCarthy, 473 F. 2d 300, 304-305 (2d Cir. 1972)) (5a).

FACTS

The Indictment

The grand larceny count ("the first count") upon which Rothschild was convicted accused him of having extorted \$6000 from William Mathis, Sr. in October, 1969 by means of fear induced by threats to use and abuse his power

as a New York City police patrolman (A-3).* The attempted grand larceny count ("the second count") upon which he was convicted accused Rothschild of attempting to extort \$8,000 in December 1969 from the same complainant, Mathis, Sr., and by the same means (A-4).

The Evidence

In support of the first count of the indictment, the prosecution relies on two witnesses: Geraldine Williams, the common-law wife of William Mathis, Jr. and the complainant, William Mathis, Sr. Their testimony in support of that count was accurately summarized by Judge Gabrielli in his opinion as follows (18a-19a):

"On October 21, 1969, defendant and other Narcotics Division officers, armed with a search warrant, entered the apartment of Geraldine Williams, the common-law wife of William Mathis, Jr. They threatened to send her to jail on a trumped up charge and to deprive her of her children unless she called her "father-in-law", William Mathis, Sr. (Mathis) to make arrangements to have him come to the apartment immediately. Frightened, she complied and upon Mathis' arrival, defendant demanded \$6,000 from him, threatening to send Miss Williams to jail if he did not comply. Mathis left and, after a short while, returned and paid the money, whereupon defendant and his companions departed."

In support of the second count of the indictment, the prosecution called Mathis, Sr., Mathis, Jr., and the arresting officers. Their testimony, as summarized

(*References to page numbers preceded by the capital letter "A" refer to pages in the record on appeal to the New York State Court of Appeals.)

by Judge Gabrielli in his opinion, follows (19a):

"Thereafter, and on December 6, the defendant again sought out Mathis, this time on the pretext that he wanted to locate Mathis' son who had been eluding him and whom he wanted to interrogate regarding a narcotics investigation. The defendant then advised Mathis that he could "[smooth] this thing over" for \$12,000 and, of course, he would not then need to locate the son. Mathis protested that he had no money but agreed to meet with the defendant at a later date. Mathis then went to police headquarters where he related all these events to the officers in command. Following their instructions, he met with the defendant and agreed to pay the money in installments, the first to be made on December 11. On that date, the police gave Mathis \$280 in marked bills, wired his establishment with recording devices and several officers secreted themselves on the premises. Upon defendant's arrival, Mathis engaged him in conversation² culminating in defendant agreeing to accept the money in installments. When Mathis handed defendant the marked money, the officers entered the room revealed their identity and arrested him."

"2. The recorded conversation referred to the October 21 extortion and defendant expressed no surprise when Mathis complained that "6,000 in two months * * * two months ago, and now twelve * * * Where the hell am I going to get that kind of money. To expedite matters, defendant inquired "[H]ow much will you pay me?" and after Mathis replied \$300 now and \$500 per week, defendant acceded. Defendant does not dispute the accuracy of the recording. He complains only that it was of poor quality and that his statements were taken out of context."

With respect to the prosecution's evidence referred to above, Judge Gabrielli in his opinion, concluded as follows (19a-20a):

"The evidence presented by the prosecution was adduced from Mathis, his son, Geraldine Williams and the arresting officers, much of which was confirmed by the recorded conversations. We hold the evidence was sufficient for the jury to find both a completed larceny by extortion on October 21 and an attempted larceny on December 11; and, further, for them to refuse to lend credulity to defendant's assertions that he was being corrupted and that he agreed to accept money from him in order to later arrest him for bribery. In short, the record reveals overwhelming evidence of the defendant's guilt."

In arriving at his conclusion that the evidence of the defendant's guilt was "overwhelming", Judge Gabrielli in his opinion, made no reference to the strong countervailing evidence which will be discussed infra, under Point II of this brief.

The Trial Court Rulings Complained of

The pertinent facts hereinafter set forth are the basis for Rothschild's claim that his rights under the Fifth and Fourteenth Amendments of the United States Constitution were substantially impaired.

At the trial, which took place in April, 1972 Rothschild took the witness stand in his own defense. He

sought on his direct examination to testify that his discussions with the complainant, Mathis, about the payment of money had not been for the purpose of extorting money from him but rather were for the purpose of obtaining evidence which would enable him to arrest the complainant for attempted bribery³. The trial court, however, sustained the prosecutor's objection to that testimony on the ground that it was "inadmissible as hearsay" (A-462).

On his cross-examination the prosecutor, despite his previous objection as noted above, led Rothschild into testifying that what had been in his mind in his discussions with the complainant was to get evidence which would enable him to arrest him for attempted **bribery** (A 546-A 549). The prosecutor then obtained Rothschild's admission that prior to his arrest he had not spoken to any superior officer in the Department about his discussions with the complainant (A 549-A 550). He then asked the questions and obtained the answers which Rothschild claims violated his Fifth Amendment rights (A 550-A 551).

"Q. After you were arrested on December 11th did you tell any superior officers or anybody --

MR. HERWITZ: If your Honor pleases, I object.

THE COURT: Overruled.

Q. That you were an innocent man just trying to get this drug peddler on a charge of bribery, did you ever tell anybody that?

MR. HERWITZ: I object to that question.

THE COURT: Overruled.

Q. Did you ever tell that to anybody?

A. No, sir.

Q. In the last twenty-eight months, did you ever tell anybody in the Police Department ranking police officers, that you have got me all wrong, I was just trying to get this drug peddler and lock him up on a charge of bribery, did you ever tell that to anybody?

MR. HERWITZ: I object.

THE COURT: Overruled.

A. No, sir."

In holding that the questions objected to were "the proper subject of cross examination" Judge Gabrielli in his opinion, said the following (21a-22a):

"...The defendant's testimony relating to the critical events was diametrically inconsistent with that produced by the prosecution thus creating the question of his credibility to be the central factual issue in the case. The natural consequences of his status as a law enforcement officer would require him to promptly report any bribe or attempted bribe

to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well."

But Judge Gabrielli, in arriving at the above-stated conclusion, apparently did not take into consideration that after Rothschild was arrested he was immediately suspended from the force and continued under suspension up to and including his trial (29a-31a) and as Judge Werker pointed out in note 8 of his opinion:

"The Court of Appeals has previously held that suspension of a New York City policeman "implies that the official is relieved of duty during the interval," and does not continue to perform his services on the force. Brenner v. City of New York 9 N.Y. 2d 447, 214 N.Y.S. 2d 444, 446, (1961). See also Gould v. Looney, 304 N.Y.S. 2d 537, 542 (S. Ct. Nassau 1969). If a policeman on suspension is relieved of all police duties is he not also relieved of all police "obligations?" (15a)

The jury was not aware of the fact that Rothschild had been suspended from police duties upon and after his arrest. His counsel did not seek to "rehabilitate" Rothschild by eliciting that fact on re-direct examination (A-650) because, as the New York Court of Appeals pointed out in People v. Rosenfeld, 11 NY 2d 290 at 299 (1962) "the serious danger of such a showing is that it suggests to the jury that the Police Department itself considers these (suspended police

officers) guilty." (citing, People v. Cioffi; 1 NY 2d 70, 74 (1956); People v. Malkin, 250 N.Y. 185 (1923).

The prosecutor, in his summation, made a vigorous attack on Rothschild's explanation for his actions and "good intentions" (A-588) and then, after a blistering excoriation of Rothschild for daring to interpose such a defense (A595-A596), he said this (A596-A597):

"...Why didn't he tell any of his superior officers about this? I don't think I even have to go into this, for it is so ludicrous. If he was going to make a case against **this** desperado, isn't he going to tell the District Attorney's office, or his commanding officer. Isn't that just common sense?" (A597).

POINT I

IN THE CONDUCT OF THE TRIAL, THE TRIAL COURT COMMITTED ERRORS WHICH DEPRIVED ROTHSCHILD OF THE FAIR TRIAL TO WHICH HE WAS ENTITLED UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION; THESE ERRORS MANDATE VACATING THE JUDGMENT OF CONVICTION AND MANDATE DISCHARGING THE ACCUSED.

Judge Werker in the court below, correctly stated that (4a-5a):

"The gravamen of the petition for writ of habeas corpus is that the trial court committed errors of constitutional proportions in permitting the prosecutor to bring out on Rothschild's cross-examination his "good intentions" in doing the acts alleged to constitute attempted grand larceny and then impeach that testimony by bringing out his failure to explain those intentions upon or after arrest. Specifically, Rothschild points to the trial court's refusal to permit him to testify on direct that his intention had been merely to arrest the complainant for bribery,⁵ and argues that (1) using evidence of post-arrest silence at trial, even for purposes of impeachment alone, violates the defendant's Fifth Amendment right to remain silent; (2) Rothschild's post-arrest silence is not inconsistent with his trial testimony and therefore cannot be used to impeach; and (3) the district attorney in any case cannot cross-examine as to areas not covered by direct testimony in order to lay a foundation for impeachment."

Judge Werker stated, that he was in agreement with Rothschild's above-stated arguments (5a) and he gave his reasons therefor (8a-12a). As the undersigned cannot hope to improve on Judge Werker's presentation of these reasons and fully subscribes to them, it is unnecessary to repeat them in this brief. Instead, this Court is merely referred thereto (1d).

Despite his conclusion as to the above-stated errors committed by the trial court, Judge Werker denied the petition for a writ of habeas corpus because, as he found, "the record reveals overwhelming evidence of Rothschild's guilt; any errors committed by the trial court were "harmless beyond a reasonable doubt." He then cited Chapman v. California, 386 U.S. 18, 24 (1967) in which the Court stated:

We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless error statutes or rules, All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.

Although it was stated in Chapman that "(not) all trial errors which violate the Constitution automatically call for reversal," that statement in the Court's opinion immediately followed this one (at 23):

"...our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" (e.g., Payne v. Arkansas, 356 U.S. 560, 2 L ed 2d 975, 78 S Ct 844 (coerced confession); Gideon v. Wainwright, 372 U.S. 335, 9 L ed 2d 799, 83 S Ct 792, 93 ALR 2d 733 (right to counsel); Tumey v. Ohio, 273 U.S. 510, 71 L ed 749, 47 S Ct 437, 50 ALR 1243 (impartial judge).

It is respectfully submitted that, if the accused in a criminal case is denied "the minimum essentials of a fair trial" he is entitled to an automatic reversal of his conviction. It is further submitted, for the reasons stated below, that Rothschild was denied "the minimum essentials of a fair trial" and that, therefore, the judgment of conviction should be reversed.

In Chambers v. Mississippi, 410 U.S. 284, Mr. Justice Powell, writing the Court's opinion, said this at 294:

The right of the accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in In re Oliver, 33 U.S. 257, 273 (1948), identified these rights as among the minimum essentials of a fair trial:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (emphasis added throughout)

In the case at bar, Rothschild's sole defense to the attempted grand larceny count was that it was his intention to accept money from Mathis in order to arrest him for bribery (20a). The only witness who could give

testimonial support to that defense was Rothschild himself. Nevertheless, the trial court ruled that such testimony was "hearsay" and he refused to permit Rothschild to so testify on his direct examination. Thus, Rothschild was denied, at that stage of the proceeding, the opportunity to offer patently relevant evidence to support his defense.

Despite the prosecutor's objection to Rothschild's testifying as to his "good intentions" on his direct examination, he nevertheless elicited such testimony from Rothschild during the cross-examination, but as Judge Werker pointed out, 'Rothschild had been precluded from offering that evidence "in any but the most indirect manner." (8a). Then, having elicited this testimony on cross-examination, the prosecutor immediately vitiated its effect by obtaining from Rothschild an admission that at the time, at or after his arrest, had he given this explanation to his superior officers.

The net result then, was that Rothschild's only defense to the attempted grand larceny charge was effectively destroyed.

Nor was Rothschild's counsel in a position to rehabilitate him on re-direct examination. He could not bring out that Rothschild was under suspension and had been from the time of his arrest. He could not bring that out because, as stated previously, the Court of Appeals of the State of New York has held that to elicit such testimony would be highly prejudicial to the defendant (People v. Rosenfeld, supra., 11 NY 2d at 299).

Not only was defendant's counsel unable to rehabilitate Rothschild on re-direct examination, he was unable to make any argument to the jury in his summation relative to this defense since the court had ruled that Rothschild's failure to reveal his defense to his superior officers was admissible. Rothschild's counsel could not argue that defense because he knew that the prosecutor, in his summation, had what appeared to be a complete answer to it.

It will thus be seen that Rothschild, with respect to the attempted grand larceny charge, was denied a fair opportunity to present his only defense to it. He was denied his constitutional right to have the jury fairly pass upon it. He was, in effect, denied the right to

have his counsel present an argument in support of his sole affirmative defense. All these factors, taken together, lead to the conclusion that Rothschild was denied the "minimum essentials of a fair trial" and is entitled to an automatic reversal of his conviction.

The trial court's errors which affected Rothschild's defense to the attempted grand larceny charge necessarily prejudiced him with respect to the grand larceny charge. Judge Gabrielli pointed out in his opinion, that "the question of his (Rothschild's) credibility (was)... the central factual issue in the case." (21a) Thus, the attack on Rothschild's credibility with respect to the attempted grand larceny charge could not help but substantially prejudice him with respect to the grand larceny charge, particularly since there was the same complainant in both counts and the acts charged were closely related. Consequently, prejudice with respect to either count necessarily affected the other.

In light of the above, it is respectfully submitted that, regardless of the alleged overwhelming evidence of Rothschild's guilt, the errors of the trial judge which resulted in the denial of the "minimum essentials of a fair trial", call for the automatic reversal of the judgment of conviction as to both counts.

POINT II

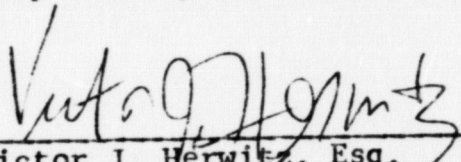
THE EVIDENCE OF ROTHSCHILD'S GUILT WAS NOT "OVERWHELMING", NOR WERE THE TRIAL COURT'S ERRORS "HARMLESS BEYOND A REASONABLE DOUBT."

Rothschild's arguments in support of his contention that the evidence of his guilt was not "overwhelming" may be found at pages 38a-56a of the appendix to which pages this Court is respectfully referred.

C O N C L U S I O N

SINCE ROTHSCHILD WAS DENIED THE "MINIMUM ESSENTIALS OF A FAIR TRIAL" AND THE EVIDENCE OF HIS GUILT WAS NOT "OVERWHELMING" HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WERE VIOLATED AND REQUIRE REVERSAL OF THE ORDER DENYING THE WRIT OF HABEAS CORPUS.

Respectfully submitted,



Victor J. Herwitz, Esq.
Attorney for Plaintiff-Appellant
Rothschild

(Michael Kopcsak, Esq. with him on the Brief.)

NOTES

1. Section 155.05 of the New York Penal Code defines larceny as follows:

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.
2. Larceny includes a wrongful taking, . . . , with the intent prescribed in subdivision one of this section, committed in any of the following ways:

* * *

(a) By extortion.

* * *

Section 155.40 states in pertinent part: .

A person is guilty of grand larceny in the first degree when he steals property and when the property, regardless of its nature and value, is obtained by extortion committed by instilling in the victim a fear that the actor or another person will . . . (c) use or abuse his position as a public servant by engaging in conduct within or related to his official duties, . . . , in such manner as to affect some person adversely.

2. Section 110.00 of the New York Penal Code defines an attempt to commit a crime as follows:
- A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect to commission of such crime.

3. MR. HERWITZ: I offered to prove, and I wish to prove the following: I wish to prove that the defendant seeks to testify to the following; that it was his information from his informant that Mathis Sr. and Mathis Jr. were important ~~drug~~ operators in Harlem, and that he had been trying for some time with his partner to get substantiated evidence against them, and that they had been unsuccessful in obtaining it, and that on the morning of December 6th, his

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informant, Blackman called him and told him that he had been beaten up by Mathis Jr. and Sr., who suspected him of being the informant. That he and Alongi went in and saw Blackman, and that as a result of that he went to see Mathis at the store hoping to put some pressure on Mathis in some form to protect his information who was afraid that he would get killed.

That on the occasion when he saw Mathis and Mathis wanted to offer him money, wanted to settle it, he told him \$12,000, and his purpose was that if Mathis wanted to accept the offer of payment that he would play along and perhaps be able to get him, if not on drugs, be able to get him on attempted bribery, and this was his motive throughout. That was what he was doing both in his conversation with Mathis on the 10th, and on the 11th, and since your Honor included in the offense of attempted extortion what he intended to do, I respectfully submit that the operation of his mind, and his reasons for doing what he had are relevant, and admissible. This generally is the area of proof that I wish to develop.

MR. GERSHMAN: I object to any after-the-fact testimony as to what his mental state was 28 months ago. It is clearly inadmissible as hearsay.

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For those reasons I object to it.

THE COURT: All right now. As to the first item I had already ruled that saying what his conversation was with Blackman, or what he was told by Blackman with reference to Mathis, beating him up is certainly hearsay, and I wouldn't allow that except to the extent that I have allowed him to say that he had seen Blackman, and as a result of that he went to see Mathis Sr.

As to the second item I don't want any misunderstanding. I haven't any objection, as I told you at the bench, to you offering in testimony anything that will bring out his intentions, but I do sustain Mr. Gershman's objection to his using his reasoning processes to tell what his intention was.

In other words, the jury can infer a man's intention from the acts that he does. I have no objection nor would I sustain an objection to any questions that you ask with reference to his acts as bringing out his intentions, but I certainly think it's improper for you to say to him, what was your reason for saying \$12,000, or how did you happen to say \$12,000, what did you mean by saying it?

And as I also said to you, if you want

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to bring Alongi, or any other witnesses to show what his acts were in order to bring out intention, you may do so.

Now, you have had your statement on the record, and that is my ruling.

You may have an exception.

MR. HERWITZ: Respectfully except, your Honor.

I want to ask him why did he say to Mathis I want \$12,000, I assume Mr. Gershman will object, so may I have your Honor's ruling on that.

MR. GERSHMAN: Do you want to do that in the presence of the jury?

MR. HERWITZ: I want to put the specific questions that I want to ask to his Honor first.

MR. GERSHMAN: Why did you pick the figure of \$12,000, that I would object to.

THE COURT: Then I'll sustain the objection to that specific question in that form.

MR. HERWITZ: What was your reason for asking this is a question I want to ask, what was his reason for asking Mathis or saying to Mathis I'll take \$12,000.

MR. GERSHMAN: I object.

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MR. HERWITZ: It's the same question, your Honor. I am making my record.

THE COURT: The same ruling applies.

MR. HERWITZ: I want to ask him, did you do that with the intent of getting \$12,000, and did he intend to obtain money from Mathis by this means.

THE COURT: When you asked for \$12,000 I'll let him say yes or no to that.

MR. HERWITZ: And I would like to follow up his answer with, then why did you do it?

MR. GERSHMAN: Then I will object to that.

THE COURT: And I will sustain his objection.

MR. HERWITZ: I would like a number of statements on the tape or the transcript--

THE COURT: You can ask him did you say this.

MR. HERWITZ: I would like to ask him why did you say you would take \$8,000, what was your reason for doing that?

THE COURT: You would have to do that with individual questions, and I will rule on them

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separately. If the question and answer is ambiguous I'll certainly let him explain what he meant by it, if it is clear, and definite I wouldn't let him explain it. I mean there are some questions on the tape that are subject to explanation, and I'll let him explain them, but when a question in the conversation in a statement by him is quite clear, I am not going to let him explain it.

That is for the jury to decide his intention from. That is a question of fact for the jury. It is only when it is ambiguous or something that is subject to explanation that I'll let him explain if.

MR. HERWITZ: And I haven't explained his motivation for what he was doing, what he was trying to do on December 11, which was to get evidence on Mathis.

MR. GERSHMAN: I object to that.

THE COURT: All right, I'll sustain the objection.

MR. HERWITZ: Respectfully except, your Honor.

THE COURT: Let's go back in front of the jury.

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